



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**REGION 8
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DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>**

Ref: 8ENF-L

SENT VIA FACSIMILE 303.893.1829
AND CERTIFIED MAIL

David A. Bailey
Schwartz, McNab & Bailey, P.C.
Hudson's Bay Centre
1600 Stout Street, Suite 1700
Denver, CO 80202

Re: L.G. Everist, Inc. - Administrative Order on
Consent, Docket No. CWA-08-2003-0070

Dear David:

Enclosed please find an original Administrative Order on Consent signed by Carol Rushin, U.S. EPA, Region 8 Assistant Regional Administrator on June 13, 2003. EPA will contact the Corps of Engineers in the next week to discuss the After-the-Fact permit.

Please let me know if there are any complications as you proceed with the mitigation work. It was a pleasure to work with you and L.G. Everist, Inc. in resolving this matter.

Sincerely,

SIGNED

Elyana R. Sutin
Enforcement Attorney

cc:

Diane Sipe, 8ENF-L
Rex Fletcher, 8EPR-EP



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

| | | |
|-----------------------------|---|------------------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| L. G. Everist, Inc. |) | |
| Harrisburg Industrial Park, |) | Docket No. CWA-08-2003-0070 |
| |) | |
| Harrisburg, South Dakota |) | |
| |) | |
| Respondent. |) | |

ADMINISTRATIVE COMPLIANCE ORDER ON CONSENT

I. INTRODUCTION

This Administrative Order on Consent (Consent Order) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and the Respondent, L.G. Everist, Inc. (Everist). This Consent Order concerns the implementation and completion of mitigation, both on-site and off-site, to compensate for alleged wetlands lost during construction of Everist's industrial park development in Harrisburg, South Dakota.

II. STATUTORY AUTHORITY

The following FINDINGS and CONSENT ORDER are made by EPA pursuant to the authority vested in the Administrator of the EPA by Sections 308 and 309 of the Clean Water Act (CWA), 33 U.S.C. §§ 1318 and 1319. The undersigned EPA official has been properly delegated the authority to issue this action.

III. PARTIES BOUND

This Consent Order shall apply to and be binding upon EPA and shall be binding upon Everist, its agents, successors, and assigns. The signatories to this Consent Order verify that they are authorized to execute and legally bind the parties they represent to this Consent Order. No change in the ownership or legal status of the Respondent or ownership of the Harrisburg Industrial Park shall alter its responsibilities under this Consent Order, except upon a conveyance or assignment of the property and improvements approved by EPA in writing, such approval not to be unreasonably withheld.

IV. STATEMENT OF PARTIES

The following FINDINGS OF FACT are made solely by EPA. In signing this Consent Order, Everist does not admit the FINDINGS OF FACT. Everist further reserves the right to deny, present evidence in contradiction to any of the FINDINGS OF FACT, and to otherwise dispute jurisdiction under the Clean Water Act in any other context or forum. Notwithstanding the foregoing, in order to provide for resolution of the alleged violations of the CWA and

without acknowledging any liability, Everist consents to the issuance of this Consent Order and agrees to abide by all the terms and conditions herein.

The parties desire to enter into this Consent Order for a compensatory mitigation program pursuant to which Everist would implement on-site mitigation and provides funds towards off-site mitigation, as more particularly described below, of the impact on alleged wetlands at the Harrisburg site in exchange for which EPA agrees not to pursue any other civil enforcement action outside of this Consent Order.

V. FINDINGS OF FACT

1. L.G. Everist, Inc. (Everist) is an Iowa corporation whose address is 300 S. Phillips Ave., Suite 200, Sioux Falls, SD 57117-5829.
2. At the time of the alleged violation, Everist owned and controlled the Harrisburg Industrial Park (Harrisburg site) located in Harrisburg, South Dakota. The Harrisburg site occupies most of the NW¹/₄ of Section 36, Township 100 North, Range 50 West, Lincoln County, South Dakota. The site contained alleged wetlands, some of which have been impacted by Everist's development of the Harrisburg Site. The allegedly affected wetlands in this matter are specifically shown on the map in Attachment 1.
3. Everist purchased 117 acres of the Harrisburg site in 1997. In 2001, an additional 42 acres contiguous to the original purchase was acquired, which are not covered by or subject to this Agreement. The two parcels were annexed as the "Industrial Park Addition" to the City of Harrisburg, South Dakota.
4. A wetland delineation done by the Natural Resources Conservation Service (NRCS) on July 30, 1998 concluded that there were 3.2 acres of wetlands, 5.4 acres of farmed wetlands and 0.5 acres of irrigated wetland for a total of 9.1 acres of wetlands at the Harrisburg site. Everist did not agree with the NRCS determination and had a separate delineation done (using the Corps' delineation manual) and submitted to the U.S. Corps of Engineers (Corps) in September, 1998 which identified fewer wetlands (one site totaling 2.5 acres). The Corps accepted the NRCS delineation on November 13, 1998 and requested Everist submit a CWA section 404 permit application.
5. On July 20, 1999, Everist submitted a CWA section 404 permit application using the NRCS determination. The permit application stated that 3.6 acres of wetlands had been or would be impacted due to the construction of buildings, roadways and rail at the Harrisburg site through the placement of fill material. A mitigation plan for 3.6 acres was included with the permit application.
6. On August 5, 1999, Everist modified the permit application to include another 5.5 acres for a total of 9.1 acres of directly and indirectly impacted wetlands, as determined by the NRCS.
7. By letter dated August 24, 1999, the Corps found that Everist's actions at the Harrisburg Site required prior Corps authorization and that the required authorization was neither applied

for prior to the discharge, nor granted. Further, the Corps directed Everist to “cease and desist” any further unauthorized work at the Harrisburg site.

8. The August 24, 1999 letter also stated that the Corps would accept an After the Fact (ATF) permit. Everist submitted ATF Permit No. 199830443 in September, 1999.

9. On November 3, 1999, EPA requested that the Corps suspend action on the ATF permit application due to potential enforcement by EPA. EPA has been investigating the alleged violations and negotiating a settlement with LGE and no formal enforcement action has been filed by EPA.

10. EPA inspected the Harrisburg site in August 2000, and agreed with the Corps’ August 24, 1999 determination that unauthorized work had occurred and wetlands had been impacted.

11. Since the filing of ATF Permit No. 199830443 in September, 1999, Everist has not been authorized by any permit issued under the CWA Section 404, 33 U.S.C. § 1344, to allow the allegedly unauthorized discharges to remain.

12. EPA alleges that the wetlands filled and disturbed by unauthorized activities (the “affected wetlands”) provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.

13. The fill material referenced in paragraph 5 above constitutes “pollutants” within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

14. The earthmoving equipment needed to move the fill material referred to in paragraph 5 above is a “point source” within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

15. Everist is a “person” within the meaning of CWA Section 502(5), 33 U.S.C. § 1362(5).

16. EPA alleges that the affected wetlands are “waters of the United States” within the meaning of 33 C.F.R. Section 328.3(a) and therefore “navigable waters” within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

17. CWA Section 301, 33 U.S.C. § 1311, prohibits the discharge of a pollutant from a point source into waters of the United States by a person without a permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344.

18. Everist has not been authorized by a permit issued under CWA Section 404, 33 U.S.C. § 1344, to conduct the activities described in paragraphs 5 and 6, above.

19. EPA alleges that Everist’s activities as described in paragraph 5 and 6, above, without such a Section 404 permit, constitute violations of CWA Section 301, 33 U.S.C. § 1311.

20. Activities to be carried out under this Consent Order are remedial, not punitive, and are achievable as a practicable matter through commonly used construction, digging, filling, revegetation, and best management practices. EPA asserts that the actions required by this Consent Order are necessary to achieve the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA Section 101(a), 33 U.S.C. § 1251(a).

21. Everist's position with respect to the Consent Decree and Mitigation Plan is summarized in this paragraph 21. Delineation of wetlands on the Harrisburg site was necessary only because Everist intended to develop an industrial park on the property (prior to Everist's acquisition of the Harrisburg site, the zoning had been changed from agricultural to industrial, consistent with Everist's intent in acquiring the property). Specifically, Everist was not producing, or proposing to produce, agricultural crops, and there was no issue related to, or arising under, the Food Security Act with respect to the property. The Natural Resources Conservation Service (f/k/a the Soil Conservation Service) delineated the wetlands, on behalf of the Corps of Engineers, using delineation standards created for determining eligibility for federal farm support programs, which Everist believes should not have been used to determine jurisdiction at the Harrisburg site. Everist asserts that its development activities did not impact any wetlands that may have been jurisdictional prior to the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("SWANCC"). Post-SWANCC, Everist believes that there are no jurisdictional wetlands at the Harrisburg site. By entering into this Consent Order, Everist does not admit that its activities at the site have caused any impact to jurisdictional wetlands or that it has any liability pursuant to the Clean Water Act at the site. Notwithstanding the foregoing, Everist reserves the right to assert its position, as summarized above, only: (a) in any other context or proceeding other than this Consent Order; (b) in the event that the EPA, the Corps or any other party asserts a claim or cause of action that is outside the scope of this Consent Order; or (c) in a subsequent action arising under this Consent Order that is based upon claims that are jurisdictional in nature. Everist expressly agrees that it will not raise jurisdictional defenses in response to a subsequent action arising under this Consent Decree which is nonjurisdictional in nature.

VI. ORDER FOR COMPLIANCE

Based upon the foregoing FINDINGS OF FACT, and pursuant to the Authority vested in the Administrator, EPA, under CWA Sections 308 and 309(a), 33 U.S.C. §§ 1318 and 1319(a), and by her delegated to the undersigned EPA official, it is hereby ORDERED and AGREED:

1. Everist shall not discharge any pollutant into wetlands or other regulated waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.
2. Prior to execution of this Consent Order, Everist submitted a Voluntary Wetland Mitigation Proposal (hereinafter, the Mitigation Plan) to EPA that provides for a wetland creation project of 3.6 acres on-site in a constructed stormwater pond and for wetland creation of an additional 5.5 acres off-site within the Madison Wetland Management District of the U.S. Fish and Wildlife Service (USFWS). The Mitigation Plan, attached hereto as Attachment 2, is

approved by EPA and incorporated into this Consent Order. The Mitigation Plan provides for an on-site wetland creation project that shall be the responsibility of, and performed by, Everist. Further, the Mitigation Plan provides that Everist shall contribute \$20,400 to fund a 5.5 off-site wetland mitigation project performed and managed by the USFWS to compensate for the loss of alleged wetlands at the Harrisburg site. Everist shall record in the real property records of Lincoln County, South Dakota, a Conservation Easement, in the form attached hereto as Attachment 3, protecting the on-site created wetland area from any future use that is inconsistent with the mitigation and conservation purposes of the Mitigation Plan. For all purposes related to this Consent Order, the conservation easement described above shall be deemed to be part of and included in the Mitigation Plan .

- a. Performance of the Mitigation Plan shall be a condition of the Corps' authorization of the past discharges (After the Fact Permit No. 199830443) and proposed future discharges into alleged wetlands at the Harrisburg site. Implementation of the Mitigation Plan, including earthwork and planting for the on-site wetland creation project, shall commence within 20 days after the date on which After the Fact Permit No. 199830443 has become final and nonappealable and shall be completed as soon as practicable thereafter. The parties acknowledge and agree that their mutual intent in entering into this Consent Order is that the on-site portions of the Mitigation Plan will be fully implemented in 2003. If there are delays beyond the control of LGE, EPA will be notified as soon as practicable and EPA will consider an extension of time. Nothing in this section, however, requires EPA to grant such extension of time.
- b. Performance of the off-site mitigation shall be provided through the USFWS's wetland restoration program. The location of the 5.5 acres of wetlands to be restored is shown in the Mitigation Plan. USFWS has advised the parties hereto that completion of the off-site mitigation should be completed prior to June 1, 2004. Everist's monetary contribution to the 5.5 off-site wetland mitigation project shall be made in 2003 as directed in writing by USFWS.
- c. Everist shall monitor the success of the on-site wetland creation project beginning in 2003, and continue annual monitoring for five (5) calendar years after the date of initial planting unless, prior to that time, the success of the mitigation project has been fully demonstrated and accepted in writing by EPA. In its assessment of the on-site mitigation project, Everist shall use the following criteria for success: "The on-site mitigation will be deemed successful by EPA when the project has achieved at least 60% ground cover of FAC, FACW, or OBL wetland plant species." Monitoring shall be performed in accordance with the procedures set forth in 1996 Corps' Habitat and Monitoring Guidelines, Attachment 4 hereto, and monitoring reports shall be submitted to the Corps and EPA no later than November 1st of each year in which monitoring occurs. If an annual monitoring report demonstrates that a mitigation project is not making progress toward meeting the criteria for success set forth above, Everist shall submit the analysis required in subsection (d) below.

- d. In the event that on-site wetland creation project fails to meet the criteria for success, Everist will repair, replace and maintain any improvements necessary to meet the criteria for success of the plan. Everist shall submit to the Corps and EPA, in its annual report or upon realization of project failure, an analysis of the project's failure and a proposed plan for correcting all deficiencies in the mitigation project. The proposed plan for correcting these deficiencies shall include provisions for adequately monitoring the effectiveness of the measures proposed to correct the deficiencies and shall be submitted to EPA for approval.
3. Within five (5) days after execution of this Consent Order, EPA will contact the Corps regarding the ATF permit and request that the ATF permit be issued subject to and incorporating the terms and conditions of this Order (including without limitation the Mitigation Plan). This Consent Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States, and Corps authorization must be received in advance of any regulated activities by Everist.
4. This Consent Order, or the signature pages thereof, may be executed in counterparts, all of which shall have full force and effect as an original, including admission into evidence, and facsimile signatures shall constitute originals for all purposes.
5. Everist's obligations under this Consent Order are severable. In the event that a court of competent jurisdiction enters a final judgment holding invalid any material provision of this Consent Order, the remainder of the Consent Order shall be fully enforceable.
6. Any deliverables, plans, reports, specifications, schedules and attachments required by this Consent Order are, upon approval by EPA, incorporated into this Consent Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Consent Order and subject to an EPA enforcement action.
7. If any event occurs which causes or may cause delays in the completion of the on-site mitigation project as required under this Consent Order, Everist shall notify and consult with EPA in an expeditious manner. Everist shall adopt all reasonable measures to avoid or minimize any such delay.
 - a. If the parties agree that the delay or anticipated delay in compliance with this Consent Order has been or will be caused by circumstances beyond the control of Everist, the time for performance hereunder may be extended for a period no longer than the delay resulting from such circumstances. In such event, the parties shall stipulate to such extension of time.
8. Everist shall allow or arrange to use its best efforts to allow access by any authorized representatives of EPA, the Corps, the USFWS, and/or the State of South Dakota Department of Environment and Natural Resources, with reasonable prior notice and upon proper presentation of credentials, to sites and non-privileged records relevant to this Consent Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Consent Order;
- b. To inspect and monitor compliance with this Consent Order; and
- c. To verify data submitted to EPA.

This Consent Order shall in no way limit or otherwise affect the United States' authority to enter, conduct inspections, have access to non-privileged records, or monitor compliance pursuant to any statute, regulation, permit, or court order. Everist shall permit such persons to inspect and copy all files, photographs, documents, and other writings, including all sampling and monitoring data, that pertain to with this Consent Order. To the extent that such information is business confidential or proprietary, Everist shall so advise such persons in writing, and 40 C.F.R. Part 2 procedures shall be followed. Everist may assert that certain documents, records and other information are privileged under the attorney-client privilege, the work-product protection or any other privilege recognized by federal law.

- 9. This Consent Order shall be effective upon execution by the parties.
- 10. Respondents shall submit all notifications and correspondence to:

Rex Fletcher (8ENF-T)
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466

- 11. EPA agrees to submit all notifications and correspondence to:

Jay Van Den Top
Rob Everist
L.G. Everist, Inc.
300 S. Phillips Ave., Suite 200
P.O. Box 5829
Sioux Falls, SD 57117-5829

Any party hereto may, by notice, change the address to which future notices shall be sent or the identity of the person designated to receive notices hereunder. Actual receipt by a person specified above of any written notice, whether or not given in accordance with the terms of this paragraph, shall be deemed to be notice given pursuant to the Consent Order.

- 12. Everist understands and acknowledges that 33 U.S.C. § 1319(d) authorizes civil penalties of up to \$27,500 per day for each violation of Clean Water Act Section 301, 33 U.S.C. § 1311, and Section 1319(c), 33 U.S.C. § 1319(c) authorizes fines and imprisonment for willful or negligent violations of the Clean Water Act. Issuance of this Consent Order shall not be deemed an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Clean Water Act for violation of this Consent Order or of the Act from and after the date of this Consent Order. Compliance with the terms and conditions of

this Consent Order shall not be construed to relieve Everist of its obligations to comply with any applicable federal, state, or local law, nor as a waiver of Everist's right to contest jurisdiction over the Harrisburg Site pursuant to the Clean Water Act in another proceeding.

13. Each party agrees to execute, approve, and adopt any and all instruments, documents and resolutions as may be reasonably required to effectuate the terms, conditions and provisions contained in this Consent Order. Such instruments, documents and resolutions shall be in form and substance reasonable acceptable to the parties.

[THE REMAINDER OF THIS PAGE HAS INTENTIONALLY BEEN LEFT BLANK.]

14. This Consent Order constitutes the entire agreement of the parties and a complete merger of all prior negotiations and agreements. This Consent Order shall not be modified except in writing signed by all of the parties hereto or their authorized representatives. Minor modifications to the Consent Order, such as granting extensions to meet scheduled milestones in the mitigation plan, can be approved by designated assignees.

BY: **SIGNED**
R.A. Everist, President
L.G. Everist, Inc.

DATE: **5/27/03**

BY: **SIGNED**
Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance, and
Environmental Justice
U.S. Environmental Protection Agency, Region 8

DATE: **6/13/03**

Attachments:

- 1.1 Location map of the Harrisburg Industrial Site, including location of the alleged wetlands on the Site.
- 1.2 Voluntary Wetland Mitigation Proposal for L.G. Everist, Inc. Harrisburg Industrial Site, Revised May 2003, prepared by Wright Water Engineers, Inc.
- 1.3 Form of Conservation Easement.
- 1.4 1996 Corps' Habitat Mitigation and Monitoring Guidelines.

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JUNE 13, 2003.